[CH] Protection for Cinematographic Exploitation from DVD Sale and Rental

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In a decision delivered on 26 September 2007, the Swiss Federal Supreme Court confirmed that the sale or rental of films at the same time as they were being shown in cinema theatres constitutes unlawful exercise of the originator's right of representation. The decision is based on paragraph 1bis of Article 12 of the Federal Act on copyright and neighbouring rights (LDA). This provision, which protects the principle of "cascade" exploitation of cinema films, prohibits offering a new film on DVD before or during its first screening in a cinema theatre (see IRIS 2004-7: 6).

The dispute was between a video club and a distribution company that had acquired exclusive rights to exploit cinema films in Switzerland. The distributor was demanding a ban on the sale or rental of DVDs of the aforementioned films while they were being shown in cinema theatres. On the basis of the distribution contracts, which required the distributor to take every reasonable measure to prevent piracy of the works, the Federal Supreme Court noted that the distribution company was entitled to take legal action to prevent infringement of the exploitation rights it had acquired.

The Federal Supreme Court also considered that only Swiss law should be applied in the dispute, notwithstanding the fact that the distribution contracts were subject to the law of another country. The dispute was, in fact, between two Swiss companies and its purpose was to protect, in Switzerland, copyright transferred to the distributor, and indeed both the prejudicial act (putting the DVD on the market) and its result (lost earnings resulting from lower attendance in cinemas) had occurred in Switzerland. Consequently, in the absence of any foreign element, there was nothing to justify implementing the rules of international private law. Indeed, Swiss international private law provides that intellectual property rights are governed by the law of the State in which the protection is claimed – in the present case this would mean Switzerland.

Lastly, the Federal Supreme Court confirmed that the video club's conduct violated paragraph 1bis of Article 12 of the LDA. The judges also considered that it was in keeping with the ordinary course of events and general experience of life that, of all the people who had rented DVDs, some would have gone to the cinema if these DVDs had not been put on the market by the video club. Having done so was therefore likely to cause prejudice to the operators of cinema

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theatres. In this respect, the Federal Supreme Court found that the monetary amount of the prejudice could be calculated more particularly on the basis of a survey indicating that 6% of the video club's clients would have gone to see the films in question at the cinema if they had not been available on DVD.

Arrêt de la 1e Cour de droit civil du Tribunal fédéral du 26 septembre 2007 (4A.142/2007)

http://relevancy.bger.ch/php/aza/http/index.php?lang=de&type=highlight_simple_query&page=2&from_date=26.09.2007&to_date=26.09.2007&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=&rank=15&azaclir=aza&highlight_docid=aza%3A%2F%2F26-09-2007-4A_142-2007&number_of_ranks=29

Decision of the 1st Court of Civil Law of the Federal Supreme Court of 26 September 2007 (4A.142/2007)

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